No. 98-1206

In The

Supreme Court of the United States

October Term, 1998

RALPH R. MABEY, CHAPTER 11 TRUSTEE FOR CAJUN ELECTRIC POWER COOPERATIVE, INC., AMERICAN COMMERCIAL TERMINALS LLC, WESTERN FUELS ASSOCIATION, INC., AND TRITON COAL COMPANY LLC,

Petitioners,

vs.

SOUTHWESTERN ELECTRIC POWER COMPANY AND THE COMMITTEE OF CERTAIN MEMBERS OF CAJUN ELECTRIC POWER COOPERATIVE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

MELANIE ROVNER COHEN
BENJAMIN D. SCHWARTZ
DARREN B. WATTS
CHRISTOPHER COMBEST
ALTHEIMER & GRAY
Attorneys for Respondent, The Committee of Certain Members of Cajun Electric Power Cooperative
10 South Wacker Drive
Chicago, IL 60606-7482
(312) 715-4000

HENRY J. KAIM
Counsel of Record
EDWARD L. RIPLEY
PATRICIA BARON TOMASCO
SHEINFELD, MALEY & KAY, P.C.
Attorneys for Respondent, Southwestern Electric Power Company
1001 Fannin, Suite 3700
Houston, Texas 77002
(713) 658-8881

(Continued On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PROFESSOR ELIZABETH WARREN
Attorney for Respondent, Southwestern Electric Power Company
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-3101

JOHN M. SHARP
SHARP, HENRY, CERNIGLIA, COLVIN & WEAVER
Attorneys for Respondent, The Committee of Certain Members of Cajun Electric Power Cooperative
15171 South Harrell's Ferry Road
Suite C
Baton Rouge, Louisiana 70816
(225) 755-1060

BOBBY S. GILLIAM
WILKINSON, CARMODY & GILLIAM
Attorneys for Respondent, Southwestern Electric Power Company
Seventeenth Floor, Beck Building
400 Travis Street
Shreveport, Louisiana 71102
(318) 221-4196

KENNETH C. RANEY, JR.
CENTRAL AND SOUTH WEST CORPORATION
Attorney for Respondent, Southwestern Electric Power Company
P.O. Box 660164
Dallas, Texas 75201
(214) 777-1115

QUESTIONS PRESENTED FOR REVIEW

1. Whether *United States v. Knight*, 336 U.S. 505 (1949), upholding a criminal conviction of a defendant who aided and abetted a bankruptcy trustee in unlawfully appropriating estate property, conflicts in any way with the Fifth Circuit's decision in this case to permit payments among plan co-proponents for professional and plan expenses subject to final approval of the bankruptcy court.

2. Whether a consensual plan of reorganization in which plan co-proponents shared legal expenses during the course of the bankruptcy can violate the absolute priority rule for "cram-down" plans.

LIST OF PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES PURSUANT TO SUPREME COURT RULE 29.6

The Committee of Certain Members of Cajun Electric Power Cooperative (the "CCM") is an unofficial committee that is represented in this case by its own bankruptcy counsel and comprises the following six distribution cooperatives: Beauregard Electric Cooperative, Inc.; Dixie Electric Membership Corporation; Jefferson Davis Electric Cooperative, Inc.; Northeast Louisiana Power Cooperative, Inc.; South Louisiana Electric Cooperative Association; Valley Electric Membership Corporation. A seventh distribution cooperative, Washington-St. Tammany Electric Cooperative, Inc., while no longer a member of the CCM, was such a member at all times during the litigation of this matter through the date of the Fifth Circuit's August 11, 1998, opinion.

The foregoing seven distribution cooperatives are not publicly-held companies but are owned by their individual rate-paying, retail customer-members. None of the foregoing distribution cooperatives have a parent company or a subsidiary which issues public shares.

Southwestern Electric Power Company ("SWEPCO") is a wholly-owned subsidiary of Central and South West Corporation ("CSW"). SWEPCO has partially-owned subsidiaries: Arklahoma Corp. and Southwest Arkansas Utilities Corporation. CSW, which has a number of other wholly-owned subsidiaries, is the only affiliate that has issued shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARENT COMPANIES AND NON-WHOLLY-OWNED SUBSIDIARIES PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Factual Background 1

C. Prior Proceedings 5

REASONS FOR DENYING THE WRIT 9

A. The Petition Is Untimely 9

B. The Questions Now Presented to This Court for Review Were Not Timely and Properly Presented to Nor Passed Upon by the Lower Courts 10

C. The Actual Decision of the Court of Appeals Precludes the Adverse Consequences That Petitioners Argue Will Result 11

D. The Trier of Fact, the Bankruptcy Court, Found All of the Material Facts in Favor of SWEPCO and the CCM. This Court's Decision in *Knight* Is Not Cause for Certiorari to Be Granted, but Rather Requires That These Fact Findings, and the Fifth Circuit's Decision, Remain Undisturbed 12

TABLE OF CONTENTS – Continued

Page

E. This Case Must Be Decided on Its Unique Facts and Those Facts, as Found and Affirmed Below, Refute the Underlying Factual Conclusions Upon Which Petitioners Premise Their Petition..... 16

F. The Court of Appeals' Decision Does Not Conflict with the *Ahlers* Decision and Could Not Conflict with Any Resolution of *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998), Now Before the Court..... 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 15

Anderson v. Bessemer City, 480 U.S. 564 (1985) 15

Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998)..... 18, 19

Boston & Maine Corp. v. Town of Hempton, 7 F.3d 281 (1st Cir. 1993) 10

Campbell v. Louisiana, 523 U.S. 392 (1998)..... 10

Curry v. Baker, 479 U.S. 1301 (1986) 16

Goodman v. Lumens Steel Co., 482 U.S. 656 (1987) 15

Johnson v. Bechtel Assocs. Professional Corp., 801 F.2d 412 (D.C. Cir. 1986)..... 10

Missouri v. Jenkins, 495 U.S. 33 (1990) 10

National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984) 15

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981)..... 15

Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988) 8, 9, 10, 18, 19

Singleton v. Commissioner of Internal Revenue Services, 439 U.S. 940 (1978) 16

United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) 10

United States v. Johnston, 268 U.S. 220 (1925)..... 15

United States v. Knight, 336 U.S. 505 (1949) 8, 9, 11, 12, 13, 14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Rivera, 844 F.2d 916 (2d Cir. 1988) 10

In re Wabash Valley Power Ass'n, Inc., 72 F.3d 1305 (7th Cir. 1995) 17

FEDERAL STATUTES

11 U.S.C. § 1123(a)(4) 8

11 U.S.C. § 1125 7

11 U.S.C. § 1129 .... 19, 20

11 U.S.C. § 1129(a)(3) 8, 9

11 U.S.C. § 1129(a)(4) 5, 6, 7, 8, 12, 15, 19

11 U.S.C. § 1129(a)(8) 9, 19

11 U.S.C. § 1129(b)(2) 19, 20

28 U.S.C. § 2101(c) 10

RULES

Fed. R. Civ. P. 52(a) 15

Fed. R. Bankr. P. 8013 15

Sup. Ct. R. 10 18

Sup. Ct. R. 13.3 10

STATEMENT OF THE CASE

A. Nature of the Case.

In the underlying bankruptcy case, Southwestern Electric Power Company ("SWEPCO") and several electric cooperatives jointly proposed a plan of reorganization under which they would enter into new, mutually acceptable and mutually desirable, long-term business relationships. This dispute presented, under unusual facts and based upon a factually intensive ruling, the issue of the extent to which bankruptcy law regulates understandings reached between such co-proponents to allocate among themselves the legal and related litigation costs incurred in seeking confirmation of their joint plan. Relying on changing theories of the case, Petitioners contend that bankruptcy law prohibits any allocation of costs by which payments are made to plan co-proponents who are also creditors or equity interest holders. As resolved by the unanimous decision of the Fifth Circuit Court of Appeals, the applicable rule provides that such payments are not prohibited but are subject to approval by the bankruptcy court as reasonable.

B. Factual Background.

SWEPCO and an unofficial committee ("CCM") composed of non-profit rural electric distribution cooperatives, each of which is a member of Cajun Electric Power Cooperative, Inc. ("Cajun" or "Debtor"), are co-proponents of a plan of reorganization (the "Joint Plan" or the

"SWEPCO Plan") filed in Cajun's chapter 11 case. App. at 2a, 3a.[1]

The CCM members presently purchase and distribute to retail customers in rural Louisiana electricity produced from Cajun's electric generating assets. Faced with the bankruptcy of their electricity supplier, several distribution cooperatives approached SWEPCO in the spring of 1995 and invited it to join in an effort to acquire Cajun's assets. Joint App. at 3243. The Joint Plan, originally filed on April 19, 1996, provides that a SWEPCO affiliate (i) will purchase Cajun's non-nuclear electric generating and transmitting assets and (ii) will enter voluntarily negotiated, mutually acceptable, new power supply contracts with consenting distribution cooperatives to supply their electricity requirements for twenty-five years. App. at 3a; Joint App. at 499, 766-926.

The plan presented by the Trustee (the "Trustee's Plan"), and supported by the other Petitioners, proposes to sell the assets to Louisiana Generating LLC ("Generating"). A third plan (the "Enron Plan") proposed a sale to an affiliate of Enron Capital & Trade Resources Corp. App. at 3a. These two Plans provided for the successful purchaser to obtain new, long-term contracts granting to it the right to sell to the distribution cooperatives all of their electricity requirements but, unlike the Joint Plan, would obligate the distribution cooperatives without their consent to the new contracts. App. at 3a; Joint App. at 998-99, 1325-85. None of the three Plans proposed

[1] "App." refers to the Appendix attached to the Petition for Writ of Certiorari. "Joint App." refers to the Joint Appendix filed with the court of appeals below.

assigning to the purchaser the existing power supply contracts between Cajun and the distribution cooperatives, the terms of which preclude Cajun from charging rates at levels from which it could earn any profits on its operations. Joint App. at 973-76.

In early 1997, SWEPCO calculated that, under the rates then proposed, the distribution cooperatives' purchase obligations for the first year alone would be approximately $220 million under the Joint Plan and approximately $250 million under the Trustee's Plan and the Enron Plan. Joint App. at 4327. By contrast, the CCM members' collective unsecured claims are approximately $616,000. Pet. at 5.

By the December 6, 1996, deadline for creditors to vote on the Plans, the distribution cooperatives voted overwhelmingly for the Joint Plan and for the Enron Plan and overwhelmingly against the Trustee's Plan. App. at 7a. The distribution cooperatives did not control the classes of unsecured creditors containing their claims under the three Plans and were not permitted to vote as equity interest holders on the Plans because they would not receive any property on account of those interests. App. at 25a, 26a. Before the Fifth Circuit, Petitioners, SWEPCO and the CCM all agreed that the "CCM members' votes were, as a practical matter, 'not worth buying'. . . . " App. at 25a.

The bankruptcy court commenced confirmation hearings on December 16, 1996. During that week, two distribution cooperatives, who were members of the unofficial members committee, announced in open court that they desired to withdraw their support for the Joint Plan and

to change their votes to ones in favor of the Trustee's Plan. On January 2, 1997, one of those distribution cooperatives moved to disqualify the CCM's counsel. App. at 7a. Thereafter, the following occurred, as set forth in the bankruptcy court's findings of fact made after conducting a six-day trial:

"A truly dramatic and watershed event occurred in this case on January 7 of 1997, [when] . . . the Court disqualified the Members Committee counsel due to an obvious contractual conflict." App. at 83a. A meeting was held that evening "and as a result of events which occurred at that meeting SWEPCO transferred the sum of $1 million to counsel for the Members Committee." App. at 84a. At that meeting, SWEPCO's president, who "was in court when the [Dann] Pecar firm was disqualified," App. at 86a,

> for the first time suggested an immediate $1 million payment. He testified that the payment was made to assist the members in their ongoing struggle for confirmation of the SWEPCO and Members plan.

App. at 86a. The bankruptcy court went on to find as follows:

> . . . The **evidence is overwhelming** that the $1 million payment, by whatever name you choose to call it, was generally made without strings attached. There is **no credible evidence** which suggests otherwise. The only requirement was that the funds would be repaid to SWEPCO in the event that the following happened, another plan was confirmed and the Members received reimbursement under the confirmed plan. The members also agreed to use their best effort to

> negotiate expense reimbursement, as a successful plan proponent.
>
> . . . [T]he payment . . . is a transition assistance payment.

App. at 86a, 87a (emphasis added).

C. Prior Proceedings.

On April 17, 1997, prior to the resumption of the confirmation hearings which the bankruptcy court had continued because of the disqualification of counsel, SWEPCO and the CCM filed with the bankruptcy court a Joint Report discussing in detail the payment at issue. App. at 11a. On April 18, 1997, the Trustee filed, in a single document, a response to the Joint Report and a combined motion and memorandum seeking immediate denial of confirmation of the Joint Plan and/or disgorgement of the payments. App. at 13a. Unlike the Petition before the Court, the motion relied principally on § 1129(a)(4) of the Bankruptcy Code, which requires for a plan to be confirmed that:

> Any payment made or to be made by the proponent [of a plan], by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.

Joint App. at 1671-79.

The bankruptcy court denied the Trustee's motion after a trial in which the court heard six days of testimony from 16 witnesses and received over 80 exhibits into evidence. App. at 14a. In its oral ruling, the bankruptcy court made specific findings of fact and determined that the payment "is for services and costs in connection with or incident to the case;" held "[s]uch payments must be approved by the Court as reasonable;" rejected the Trustee's argument that § 1129(a)(4) required court approval prior to the payment; and held that court approval could be obtained subsequently. App. at 88a, 89a.

The bankruptcy court rejected Petitioners' accusations of vote buying, improper lock-up and bad faith, finding:

> At the time the payment was conceived and when it was made, however, the votes were already in . . . As stated earlier in the terms of the letter of . . . [SWEPCO's attorney] of January 9, clearly indicate that the payment did not lock in any of the members. They were free to meet and negotiate [with all potential purchasers]. In fact, they did.

App. at 87a. The bankruptcy court also rejected Petitioners' assertions of inadequate disclosure and found as facts that (i) the disclosure statement for the Joint Plan approved on November 22, 1996, placed all parties on notice that such a payment may be negotiated; and (ii) SWEPCO and the CCM at all times intended to make disclosure at the appropriate time. App. at 87a.

The district court, sitting as an appellate court, held the bankruptcy court's factual findings were clearly erroneous and reversed the bankruptcy court on all issues then raised by Petitioners. App. at 49a, 56a. The district court ordered the immediate disqualification of the Joint Plan and an immediate refund of the $1 million payment. The district court ordered the money repaid to SWEPCO, because it concluded that the money could not go into the bankruptcy estate. App. at 74a, 75a.

The district court ruled, among other things, that SWEPCO and the CCM violated § 1129(a)(4) because

> SWEPCO failed to get prior approval and the Court believes that the payments were made for an improper purpose, namely, the Court believes that this was made as a preconfirmation payment to lock in votes.

App. at 50a.

SWEPCO and the CCM appealed to the Fifth Circuit Court of Appeals, which stayed the district court's order. App. at 19a. In a unanimous decision entered August 11, 1998, the court of appeals reversed the district court, affirmed the bankruptcy court and directed that "[t]he mandate shall issue forthwith." App. at 36a.

The court of appeals' opinion addressed each ground relied upon by the district court. The court of appeals held the district court erred in holding that the bankruptcy court's factual findings were clearly erroneous and reversed the district court's holdings that (i) the payment was made for an improper purpose, *i.e.*, to buy the CCM members' votes; (ii) the Joint Plan violated § 1125 of the Bankruptcy Code because the disclosure

was inadequate; and (iii) the Joint Plan violated § 1129(a)(3) of the Bankruptcy Code. App. at 26a, 32a, 35a.

The court of appeals reversed the district court's rulings on the absolute priority rule and on § 1123(a)(4) of the Bankruptcy Code, each for the following same reasons: (i) "the payments were not derived directly or on this record indirectly, from assets of the bankruptcy estate;" and (ii) "as the bankruptcy court found, the payments were not made in satisfaction of the CCM members' claims against Cajun, but rather as reimbursement for plan and litigation expenses incurred in the bankruptcy case." App. at 33a, 34a.

The court of appeals affirmed the bankruptcy court's rulings on § 1129(a)(4) and rejected the district court's construction of that section to require court review prior to payment. App. at 20a-30a. Thus, the court of appeals affirmed both the factual finding that the payments were reimbursement for legal and plan expenses and the holding that the payments were subject to court approval as reasonable.

Petitioners' brief to the Fifth Circuit did not present any arguments analyzing the absolute priority rule. Nor did it cite *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988) (*"Ahlers"*). Petitioners' brief did cite *United States v. Knight*, 336 U.S. 505 (1949) (*"Knight"*), a case not previously cited by Petitioners to either the bankruptcy court or the district court.

After the court of appeals' decision, Petitioners filed a "Suggestion for Rehearing *En Banc* by Appellees", which also contained a request for panel rehearing.

There, Petitioners discussed *Knight* more extensively than initially; cited *Ahlers*; and, for the first time before any court, attempted to develop an argument regarding the absolute priority rule.

The court of appeals took the filing as a motion to recall the mandate to restore jurisdiction in the court of appeals and denied it *per curiam*. App. at 91a.

On January 27, 1999, 169 days after entry of judgment by the court of appeals, Petitioners filed their Petition for Writ of Certiorari.

On February 11, 1999, the bankruptcy court entered its Reasons for Decision on the confirmation of the Trustee's Plan and the Joint Plan, which denied confirmation of both and provided some guidance for possible plan modifications. In its Reasons for Decision, the bankruptcy court concluded, among other things, that (i) the Trustee's Plan did not satisfy § 1129(a)(3), which requires a finding that the plan was proposed in good faith and not by means forbidden by law; (ii) the Joint Plan complied with § 1129(a)(3); and (iii) the Joint Plan satisfied the requirements of § 1129(a)(8), a finding which as a matter of law obviates the need to address compliance with the absolute priority rule.

REASONS FOR DENYING THE WRIT

A. The Petition Is Untimely.

The court of appeals order, entered on August 11, 1998, reversed the district court order and directed that the mandate issue forthwith. This terminated the court of

appeals' jurisdiction over the case. *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993); *United States v. Rivera*, 844 F.2d 916, 921 (2d Cir. 1989). This also necessarily reduced to zero the time period for filing a petition for rehearing. *Johnson v. Bechtel Assocs. Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). The court of appeals, treating the Petition for Rehearing and Suggestions for Rehearing *En Banc* as motions to recall the mandate, denied them on October 29, 1998. Accordingly, Petitioners did not file a timely petition for rehearing.

The time to file a petition for writ of certiorari, therefore, was not extended by Sup. Ct. R. 13.3. Petitioners did not file their Petition for Writ of Certiorari within 90 days after entry of judgment by the court of appeals. The Petition for Writ of Certiorari is thus untimely, and this Court lacks jurisdiction. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990); 28 U.S.C. § 2101(c).

B. The Questions Now Presented to This Court for Review Were Not Timely and Properly Presented to Nor Passed Upon by the Lower Courts.

This Court's traditional rule precludes a grant of certiorari when the question presented was not pressed or passed upon below. *Campbell v. Louisiana*, 523 U.S. 392 (1998); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994). That is the situation here.

Petitioners seek to have this Court address a legal question pertaining to *Ahlers* and the absolute priority rule even though they did not brief the question to the court of appeals until they sought rehearing, when Petitioners presented a different legal argument than now

raised. Then, Petitioners criticized the court of appeals' "test" because "it is essentially factual," and argued that application of the absolute priority rule cannot be based upon the parties' "justification for the payment." Suggestion at 15, 16. Now, before this Court, Petitioners argue that the justification for the payment, an inherently factual issue, is the test that must be used to determine whether the payment violates the absolute priority rule. Pet. at 14, 15.

Similarly, Petitioners ask this Court to address *Knight*, even though Petitioners failed to cite *Knight* or to present any arguments based on it to either the bankruptcy court or the district court.

Petitioners' attempt to use a writ of certiorari to enable them to argue before this Court issues which they failed to press properly and fully below is unjustifiable. The writ is properly denied.

C. The Actual Decision of the Court of Appeals Precludes the Adverse Consequences That Petitioners Argue Will Result.

Petitioners argue that this case is of general importance because the court of appeals' decision undermines rules of law protecting creditors and permits abusive practices in that it would allow, among other things, the following: (a) bidders for assets of a bankruptcy estate to pay cash directly to important stakeholders rather than to the estate; (b) stakeholders to extract money from bidders that would be otherwise distributed under the bankruptcy priority rules; and (c) payments to junior interests outside of a plan. Pet. at 2, 9, 13. Petitioners' arguments

are conclusively refuted, however, by (i) the factual finding affirmed by the court of appeals that the payment at issue was to cover legal and plan expenses incurred in connection with the bankruptcy case; and (ii) the holding affirmed by the court of appeals that the payment is subject to review and approval by the bankruptcy court as reasonable.

Although the applicability of § 1129(a)(4) and its requirement for court approval was the issue most extensively discussed by the court of appeals, the Petition avoids mentioning that. Petitioners' justification for the writ of certiorari necessarily relies on a materially incomplete and misleading description of the court of appeals' decision and does not present a valid reason for the writ to be granted.

D. The Trier of Fact, the Bankruptcy Court, Found All of the Material Facts in Favor of SWEPCO and the CCM. This Court's Decision in *Knight* Is Not Cause for Certiorari to Be Granted, but Rather Requires That These Fact Findings, and the Fifth Circuit's Decision, Remain Undisturbed.

Petitioners rely on *Knight* to argue that this Court should hear this matter. A review of the bankruptcy court's findings of fact and of the *Knight* decision itself compel the conclusion that the factual findings and holdings of the bankruptcy court, affirmed by the Fifth Circuit, must be left undisturbed.

The facts of this case establish the financial assistance as a legitimate business transaction: one plan co-proponent and co-litigant helping another with professional

fees in a critical time of need. No estate assets were used to pay these fees; the funds were SWEPCO's. The payments were not derived directly or even indirectly from estate assets and did not deplete the estate. No estate professionals were involved; the CCM is an unofficial private committee that was not appointed by the bankruptcy court. No illicit purpose was involved. The bankruptcy court found as a fact that there was no improper *quid pro quo* for the payment. It further found as a fact that the funds were for assistance in the transition to new counsel. The bankruptcy court found the disclosure adequate. The Fifth Circuit determined that these findings were not clearly erroneous.

Petitioners' reliance on *Knight* is without merit. *Knight* was a criminal case. The critical facts in *Knight* are that the buyer had agreed to pay a higher price, and the trustee then intentionally and falsely underreported the value of the estate's assets, enabling him to divert some of the purchase price for his own personal gain. *Knight* turned on egregious facts far removed from those found in this case.

In *Knight*, a buyer agreed to buy assets, including a fixed amount of net current assets, from a bankrupt company. The plan of reorganization that incorporated that sale was confirmed. Subsequently, the trustee for the bankrupt company approached the attorney for the buyer and informed him that, in addition to whatever fee the bankruptcy court would allow to him, he desired another $3,000. A scheme was hatched whereby the trustee would fraudulently underreport the net current assets by $3,000, effectively reducing the buyer's purchase price. The buyer then issued a check payable to its own lawyer, who

cashed the check, and, after deducting $500 for his own taxes, paid the remaining $2,500 to the trustee. All of this was done after confirmation, secretly and without court approval, and depleted assets of the estate.

The actual holding of *Knight* confirms that a fact finder's determinations concerning a transaction must be upheld where the evidence supports those findings. In *Knight*, the jury found that the buyer had agreed to pay a higher price that included the $3,000 that had been diverted to the trustee. The Third Circuit Court of Appeals reversed. In reversing the Third Circuit, this Court held as follows:

> There was substantial evidence that Maxi [buyer] agreed to pay $26,404.33 for the net current assets of Central [bankrupt] and that Knight was party to a scheme to divert $3,000 of the consideration to the personal ends of Michael [Trustee] and Reifsnyder. It was therefore an **improper interference with the jury's function** for the Court of Appeals to reject that theory of the case and to accept one which to it seemed more credible.

336 U.S. at 508 (emphasis added).

In this case, after a six-day trial, after hearing 16 witnesses and after considering over 80 exhibits, the bankruptcy court found that the payments were made for professional fees and expenses to help the Committee with its transition to new counsel. All votes on the plan had been cast well before any payments were made. The Joint Plan, which fixed the purchase price (initially, $780 million; now, $940.5 million), had been on file months before the financial assistance was provided. SWEPCO

never reduced its purchase price. In fact, over the next year, all bidders, including SWEPCO, raised their purchase prices significantly.

The holding in *Knight* simply recognizes that due deference must be given to the fact finder's determinations of the facts, which in *Knight* were particularly offensive, and the rule that findings of fact shall not be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a); Fed. R. Bankr. P. 8013; *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

The bankruptcy court's ruling on these facts and the Fifth Circuit's upholding of the same are not cause to grant a writ. The Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981). Application of this rule is particularly appropriate where, as here, the trial court's factual findings were affirmed by the court of appeals. *Goodman v. Lumens Steel Co.*, 482 U.S. 656, 665 (1987); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984).

Petitioners argue that the Fifth Circuit's decision will cause bankruptcy courts to lose control of bankruptcy sales and auctions. To the contrary, the Fifth Circuit held that § 1129(a)(4) requires bankruptcy court review and approval of fees paid by a plan proponent in connection with a plan.

Moreover, the Fifth Circuit's decision affirms that Petitioners had no evidence to substantiate their argument that purchase price consideration was used to influence stakeholders. The bankruptcy court found that the

payments were indeed to assist the CCM in transition to new counsel, and nothing more. The CCM has filed papers that describe and itemize expenses its members have incurred in this bankruptcy case that more than offset the amounts received from SWEPCO. Pursuant to the Fifth Circuit's ruling, the bankruptcy court must determine their reasonableness.

E. This Case Must Be Decided on Its Unique Facts and Those Facts, As Found and Affirmed Below, Refute the Underlying Factual Conclusions Upon Which Petitioners Premise Their Petition.

Denial of a writ of certiorari is fully appropriate when the case involves atypical or unique circumstances. *Curry v. Baker*, 479 U.S. 1301 (1986); *Singleton v. Commissioner of Internal Revenue Services*, 439 U.S. 940, 945 (1978) (acknowledging that "it [is] entirely appropriate to disfavor complicated cases which turn largely on unique facts").

For several reasons, the specific factual circumstances presented in this unique case must control the resolution. Among those factual circumstances are the following:

1. The payments resulted from the unusual and unanticipated disqualification of counsel for the CCM.

2. The payments were made by one proponent of a plan of reorganization to its co-proponent to cover the recipient's plan and litigation-related expenses, when there were two other competing plans pending.

3. The distribution cooperatives' principal status was as prospective parties to new supply contracts.

4. Cajun is a non-profit cooperative.

5. The bankruptcy involves a debtor in a regulated industry.

Non-profit cooperatives are unique entities. It is not surprising that, after wrestling with the application of the absolute priority rule in another electric cooperative chapter 11 case, the Seventh Circuit Court of Appeals concluded as follows: "it is small wonder that the rules of chapter 11 bankruptcy, primarily designed as they are for profit-seeking enterprises, are less than straightforward to apply here." *In re Wabash Valley Power Ass'n, Inc.*, 72 F.3d 1305, 1315 (7th Cir. 1995).

This bankruptcy case features economic tensions not normally associated with bankruptcy matters. This bankruptcy involves the economic conflict inherent in the task of determining a purchase price for business assets in a regulated industry covering non-profit cooperatives. The limitations on the future revenues that a purchaser can realize from its future customers from the output from those regulated assets create economic tension unlike that in most chapter 11 cases.

Furthermore, the specific facts of this case, and the findings of fact made and affirmed below, refute the underlying factual conclusions subsumed in the questions presented by Petitioners for review. Among the underlying factual conclusions not substantiated by factual findings made below are the following: (i) the newly

asserted contention[2] that SWEPCO only offered and the CCM members only accepted the payments because of the CCM members' claims and equity interests (which is contradicted by the bankruptcy court's findings of fact as to what was, and was not, the reason for the payments); (ii) the contention that the payments were made under a plan (which is contrary to the Petition's own characterization of the payments as made " 'outside' of and prior to a confirmed plan of reorganization," Pet. at *i*); and (iii) the contention that the payments were derived directly or indirectly from the assets of the estate (which the court of appeals determined was unsupported by the record).

As the record does not establish the correctness of any of these subsidiary factual conclusions, were the Court to take this case, it would have to evaluate the underlying evidence and determine whether the factual findings made below were erroneous. In such a circumstance, denial of the writ is appropriate under the standards set forth in Sup. Ct. R. 10.

F. The Court of Appeals' Decision Does Not Conflict with the *Ahlers* Decision and Could Not Conflict with Any Resolution of *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998), Now Before the Court.

Compliance with the absolute priority rule only needs to occur when the proposed plan does not satisfy

---

[2] Before the court of appeals, Petitioners stated "[w]hile the Members are voting creditors and equity holders, their primary importance to any plan is as continued customers and purchasers of the power generated by the acquired assets." Pet. Appellee Brief at 3.

the requirement under § 1129(a)(8) that each impaired class of claims or interests has accepted the plan. When a bankruptcy court finds the § 1129(a)(8) requirement is met, as recently done by the bankruptcy court with regard to the Joint Plan, then as a matter of law the absolute priority rule is not at issue.

Even if the absolute priority rule were to be addressed with respect to the Joint Plan, the payment at issue does not present any issue with regard to the application of the rule. Neither the *Ahlers* decision nor any decision this Court may make in *Bank of Am. Nat'l Trust and Sav. Ass'n v. 203 N. LaSalle St. Partnership*, 126 F.3d 955 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 1674 (May 4, 1998), with regard to the existence of the "new value" exception to the absolute priority rule, has any relevance.

Indeed, the inapplicability of the absolute priority rule is established by the holding made and affirmed below that the payments are within the ambit of § 1129(a)(4). Section 1129 of the Bankruptcy Code sets forth numerous requirements for confirmation of a proposed plan of reorganization. One such requirement, set forth in § 1129(a)(4), deals with payments made or to be made for services or costs rendered in connection with the bankruptcy case or the plan of reorganization. A separate section, § 1129(b)(2) (which codifies the absolute priority rule), allows for confirmation over rejection by a class of claims and, thus, deals with payments received under the plan on account of claims or equity interests.

The criteria used to determine whether the plan may be confirmed differ for the two types of payments. Payments made for services rendered are subject only to the

requirement that the bankruptcy court approve them as reasonable. On the other hand, payments under a plan made on account of claims or equity interests are not subject to any requirement that they be approved as reasonable. Rather, the criteria of § 1129(b)(2) address whether holders of unsecured claims in senior classes either accepted the plan or will receive distributions of a value equal to their allowed claims.

The presence of these separate provisions in § 1129 dealing with different types of payments and imposing different criteria necessarily establishes that a finding that a payment was for services in connection with a plan precludes that payment from being one on account of a claim or equity interest subject to scrutiny under § 1129(b)(2).

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

HENRY J. KAIM
Counsel of Record
EDWARD L. RIPLEY
PATRICIA B. TOMASCO
SHEINFELD, MALEY & KAY, P.C.
Attorneys for Respondent, Southwestern Electric Power Company
1001 Fannin, Suite 3700
Houston, Texas 77002
(713) 658-8881

PROFESSOR ELIZABETH WARREN
Attorney for Respondent, Southwestern Electric Power Company
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-3101

BOBBY S. GILLIAM
WILKINSON, CARMODY & GILLIAM
Attorneys for Respondent, Southwestern Electric Power Company
Seventeenth Floor, Beck Building
400 Travis Street
Shreveport, Louisiana 71102
(318) 221-4196

KENNETH C. RANEY, JR.
CENTRAL AND SOUTH WEST CORPORATION
Attorney for Respondent, Southwestern Electric Power Company
P.O. Box 660164
Dallas, Texas 75201
(214) 777-1115

MELANIE ROVNER COHEN
BENJAMIN D. SCHWARTZ
DARREN B. WATTS
CHRISTOPHER COMBEST
ALTHEIMER & GRAY
Attorneys for Respondent, The Committee of Certain Members of Cajun Electric Power Cooperative
10 South Wacker Drive
Chicago, Illinois 60606-7482
(312) 715-4000

JOHN M. SHARP
SHARP, HENRY, CERNIGLIA,
COLVIN & WEAVER
Attorneys for Respondent,
The Committee of Certain
Members of Cajun Electric Power
Cooperative
15171 South Harrell's Ferry Road
Suite C
Baton Rouge, Louisiana 70816
(225) 755-1060